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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SLM MARKETING, INC.,

Plaintiff and Respondent,

v.

NEPTUNE MARKETING TECHNOLOGIES,  
INC.,

Defendant and Appellant.

D038708

(Super. Ct. No. GIC738033)

APPEAL from a judgment of the Superior Court of San Diego County, Robert E. May, Judge. Affirmed as modified and remanded with directions.

Neptune Marketing Technologies, Inc. (Neptune) appeals a judgment entered against it in an action by SLM Marketing, Inc., a corporation (the Corporation), for unpaid commissions under a sales agent agreement (the Agreement) it entered into with the Corporation's predecessor, an unincorporated entity that operated under the fictitious business name of SLM Marketing, Inc. (the Proprietorship; where appropriate, the

Corporation and the Proprietorship are referred to interchangeably as SLM). Neptune contends that the judgment must be reversed because (1) the Agreement was illegal and void; (2) the Corporation lacked standing to sue on the Agreement; (3) the trial court erred in finding that the Proprietorship's misrepresentations in the Agreement were not material; and (4) the trial court erred in concluding that SLM was entitled to the commissions in connection with three customer contracts. It also contends that (5) the Corporation could not recover commissions relating to another customer contract because it did not seek to recover such commissions in its complaint or identify its claim therefor in discovery; (6) the trial court improperly calculated the amount of those commissions; and (7) the Corporation was not entitled to recover any commissions after October 2000 when the Agreement expired. We agree that the trial court erred in awarding the Corporation commissions on one of the customer contracts and modify the judgment to strike that award, as well as the award of interest. We affirm the judgment as so modified and remand the matter for redetermination of the interest award.

#### FACTUAL AND PROCEDURAL BACKGROUND

Neptune had a contractual relationship with MCI Telecommunications Corp. (MCI), whereby Neptune was authorized, directly or through subagents, to sell MCI products and services throughout the United States. Pursuant to the MCI contract, Neptune received commissions of 13 to 15 percent on net sales to customers it or its subagents procured. The MCI contract prohibited Neptune from offering MCI employees a financial incentive to obtain customer leads, although it allowed Neptune's agents to work through MCI's branch

representatives to sell certain products for which pricing information was not available to Neptune.

In July 1997, Neptune hired Richard Liuag from his position as an MCI sales representative to work as its sales manager in southern California. In the new position, Liuag was responsible for (1) making direct sales of MCI products and services on behalf of Neptune, (2) developing a plan to expand Neptune's marketing to include MCI voice and data services, and (3) recruiting and providing support to subagents that sell MCI products and services through Neptune as the master agent. Liuag planned to set up a subagent to recruit MCI employees to obtain information about potential customers outside the employees' assigned territories so that the subagent could sell MCI products and services to those customers without violating MCI's contractual prohibition against working directly with its employees.

On September 30, 1997, Neptune entered into the Agreement with the Proprietorship, a business entity of Liuag's girlfriend (who subsequently became his wife), Stephanie Maizel. In the contract application, Maizel represented that she was a "telecom consultant specializing in cost savings and service," although she was actually a full time teacher and had done very little telecommunications work. The Agreement included a representation by the Proprietorship that it was "duly incorporated, validly existing and in good standing in the State of California[.]" although the Proprietorship did not actually incorporate until December 1998, more than a year later. Maizel testified that, at the time she entered into the Agreement, she believed her attorney had already filed the documents necessary to

incorporate the Proprietorship; she also testified that, upon its incorporation, the Proprietorship assigned its rights and obligations under the Agreement to the Corporation.

Pursuant to the Agreement, the Proprietorship was authorized to act as Neptune's agent in marketing MCI products and services to commercial customers and was to receive commissions of 8 to 10 percent on "commissionable" revenues from customer accounts procured as a result of its solicitation efforts. The Agreement was for a two-year term, subject to automatic renewal "for an additional term of twelve (12) months unless either party [gave] written notice of non-renewal to the other party a minimum of thirty (30) days prior to the renewal date." During the term of the Agreement, the Proprietorship agreed to promote and sell MCI services exclusively on Neptune's behalf. Neptune had the right to terminate the Agreement if the Proprietorship offered or provided a financial or other incentive to obtain customer leads or other information for its own benefit and failed to cure such "unethical conduct" within seven days of notice from Neptune.

Neptune approved the Agreement without any discussion with Maizel and forwarded the document to MCI for its approval. The Agreement became effective in October 1997, when MCI approved it. Thereafter, Liuag started selling MCI products and services in the name of the Proprietorship.

In September or October, MCI employee, Stan Swoyer, contacted Liuag, indicating that he had a significant potential customer that he was interested in routing to an outside agent because the customer was outside his MCI territory, thus precluding him from being compensated by MCI if he procured the contract directly. Liuag agreed that the Proprietorship would act as the agent on the contract with the customer and that he and

Swoyer would split the commissions SLM received on a 50/50 basis, but he did not inform Neptune of this arrangement. Liuag assisted Swoyer by providing support on technology issues, procedural questions and selling strategies, but Swoyer dealt directly with the prospective customers, PC Channel, Inc. (PC Channel) and CTX International, Inc. (CTX).

In December 1997, Liuag entered into a three-year service contract with M2 Automotive, Inc. (M2) and informed Neptune that the Proprietorship was the agent on the contract. Sometime during the third week in February 1998, Neptune terminated Liuag, who thereafter went back to work for MCI. On February 23, 1998, Swoyer processed separate three-year MCI service contracts with PC Channel and CTX and identified the Proprietorship as the procuring agent for those agreements. MCI paid Neptune commissions based on the revenues attributable to these contracts from May 1998 to March 1999 and Neptune in turn paid SLM its share of the commissions.

In June 1998, prior to the expiration of the first M2 contract, Liuag arranged for M2 to enter into a new, more expanded MCI service contract and identified the Proprietorship as the procuring agent for the new contract. Although Liuag's MCI branch was initially credited with the second M2 contract, it released the contract to Neptune in April 1999, after which Neptune serviced the contract and received commissions therefor. Neptune did not pay any commissions to SLM on the second M2 contract.

In November 1998, Neptune invited Liuag to work for it as a subagent through SLM rather than as its employee. It sent Liuag a written proposal, which indicated in part that it would continue to pay SLM commissions for sales Liuag generated on SLM's behalf. Liuag did not respond to the proposal.

In December 1998, Liuag arranged a contract for MCI services with Southeast Wood Treating, Inc. (Southeast Wood) and credited the contract to SLM, initially through Liuag's MCI branch. After SLM submitted customer orders under the contract through Neptune, MCI released the Southeast Wood contract to Neptune and paid Neptune commissions on the contract, but Neptune refused to make any payment to SLM because it concluded that Liuag was acting as an MCI employee at the time he procured the contract.

Neptune continued its discussions with Liuag about the possibility of his working as a Neptune agent and about the issue of commissions on the Southeast Wood contract until April 1999, by which time Neptune stopped paying commissions to SLM on any of the contracts at issue.

The Corporation brought this action against Neptune and MCI for breach of contract, accounting and unjust enrichment. Neptune cross-complained against SLM for breach of contract, misrepresentation and unjust enrichment, seeking to recover commission payments made in accordance with the Agreement. The Corporation dismissed its claims against MCI prior to trial.

After a bench trial, the court issued a statement of decision in which it found in Neptune's favor on the cross-claim for unjust enrichment as to the commissions it paid to SLM on the first M2 contract because Liuag procured the contract while he was an employee of Neptune. It also found, however, that Neptune was obligated to pay the Corporation commissions on the PC Channel, CTX, Southeast Wood and second M2 contracts for the period ending January 2001 because (1) Liuag acted on SLM's behalf in procuring the contracts, which benefited Neptune; (2) there was no evidence of contracts or policies

precluding SLM from receiving credit for contracts arranged by Liuag while he was employed by MCI; and (3) Neptune did not terminate the Agreement or notify MCI of any irregularities in SLM's practices, but instead continued to pay SLM despite its awareness of Liuag's involvement with SLM. The court rejected Neptune's cross-claim for fraud based on its finding that SLM did not make any material misrepresentation to Neptune.

After additional briefing and a hearing on damages, the court awarded the Corporation \$164,966.27 in damages for unpaid commissions for the period ending January 2001, plus interest of \$19,607.39, and awarded Neptune damages of \$908.83. The court declined to award future commissions or to retain jurisdiction over that matter. Neptune appeals the resulting judgment.

## DISCUSSION

### 1. *SLM's Failure to Comply with the Fictitious Business Name Statute*

Neptune argues that, because the Proprietorship was not incorporated at the time it entered into the Agreement, its use of a fictitious business name that included the term "Inc." was improper and that this voided the Agreement or rendered the Agreement illegal. However, although it is a violation of Business and Professions Code section 17910.5 for an unincorporated entity to use the word "Inc." in its fictitious business name, the statutory penalties for such a violation are that the violator (1) may be found guilty of a misdemeanor and fined up to \$1,000 (Bus. & Prof. Code, § 17930) and (2) cannot "maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state" until the violator complies with the statutory requirements (Bus. & Prof. Code, § 17918). Neptune cites no authority, nor have we found any, indicating that the

improper use of "Inc." in a fictitious business name voids any and all contracts entered into by the entity using that name. (In fact, see *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 1001, fn. 8 [indicating, in dicta, that a party's failure to comply with fictitious business name statutes does not render its promises, agreements and transactions invalid as such, but merely precludes it from enforcing the agreements until it complies with the statutory requirements]; Cal. Law Revision Com. com., West's Ann. Bus. & Prof. Code (1997 ed.) foll. § 17918, p. 418.) Neptune has not established that the Agreement was void as a result of the Proprietorship's use of an improper fictitious business name.

## 2. *The Corporation's Standing to Sue*

Neptune also challenges the Corporation's standing to sue it under the Agreement on three grounds. First, Neptune argues that the Proprietorship could not bring an action against it (and thus had no right to sue that could be assigned to the Corporation) because the Proprietorship failed to comply with the statutory requirements relating to the filing of a fictitious business name. However, this argument confuses the concepts of the capacity to sue, on one hand, and standing to sue, on the other. One lacks the capacity to sue when it suffers from a legal disability, such as infancy, insanity, incarceration or suspension of corporate rights, that deprives it of the right to come into court. (*Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224; *Reed v. Norman* (1957) 48 Cal.2d 338, 342; see generally 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 208; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 78.) By contrast, one lacks standing to sue when it has neither suffered, nor is about to suffer, injury and thus has no right to relief in court. (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 757-758;



*Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520, 531.) The Proprietorship's failure to comply with the requirements for filing a fictitious business name statement has no bearing on whether it suffered injury as a result of Neptune's failure to pay it commissions on contracts it procured and thus affects only its capacity (which Neptune does not challenge here), not its standing, to sue.

The second component of Neptune's standing challenge is a contention that there is no evidence showing the Proprietorship assigned its rights under the Agreement to the Corporation. However, Maizel's trial testimony was that such an assignment occurred at the time of the Proprietorship's incorporation. Although this evidence is perhaps not the most compelling, it is unchallenged in the record and thus, Neptune's contention in this regard is also unavailing.

Neptune's third argument is that the Proprietorship's assignment to the Corporation was invalid because the Proprietorship did not obtain its written consent thereto as required under the Agreement. However, the Proprietorship's failure to obtain Neptune's consent to the assignment does not affect the Corporation's *standing* to bring an action on the contract, although it may affect its ability to recover. (See *Don Rose Oil Co. v. Lindsley* (1984) 160 Cal.App.3d 752, 759-760.)

Neptune has not established that the Corporation lacked standing to sue it for failing to pay commissions under the Agreement.

### 3. *Neptune's Fraud Cross-claim*

The trial court rejected Neptune's cross-claim against the Corporation for fraud based on the finding that Neptune did not meet its burden of proof to establish that the

Proprietorship made material misrepresentations in the Agreement. Neptune challenges this finding on the ground that the Proprietorship's misrepresentations regarding its corporate status and Maizel's experience in the telecommunications industry were material, as was its failure to disclose its intended purpose of obtaining customer information from MCI employees.

A. The Materiality of the Misrepresentations

A misrepresentation is "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 (*Engalla*), quoting Rest.2d Torts, § 538, subd. (2)(a).) Materiality is generally a question of fact unless the misrepresented fact is "so obviously important" that its materiality is established as a matter of law. (*Engalla, supra*, 15 Cal.4th at pp. 977-978.)

Neptune contends that the materiality of the Proprietorship's representations is established as a matter of law because the contract provided that the representations were made "as an inducement to Neptune to enter into [the] Agreement[.]" However, although contractual language may, under appropriate circumstances, establish the materiality of a representation as a matter of law, we conclude that the mere inclusion of boilerplate language in the contract is not sufficient to do so.

Absent a basis for establishing the materiality as a matter of law, we review the record to determine whether substantial evidence supports the trial court's finding that Neptune failed to prove that SLM's misrepresentations were material. (E.g., *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 374.) We conclude

that such evidence exists. Neptune's former corporate counsel and current president, Barbara Geary, testified that Neptune did not require that its subagents be corporations and that she could not say whether she would have refused to forward the Agreement for MCI's approval if she had known of the Proprietorship's unincorporated status. Neptune did not present evidence that Geary relied on, or seriously considered, Maizel's representations about her telecommunications experience, which was part of the sales agent information identified by the Agreement as "required by MCI." On this record, the trial court could have reasonably concluded that Neptune had not met its burden to establish that the Proprietorship's misrepresentations were material.

B. Failure to Disclose

Neptune also argues the evidence shows that the Proprietorship failed to disclose its intent to obtain customer information from MCI employees and that Neptune would not have entered into the Agreement if it had known of this intent. Assuming, without deciding, the validity of Neptune's argument regarding the materiality of the Proprietorship's concealed intent, Neptune does not cite any authority or make any argument to establish that the Proprietorship had a duty to disclose such information. Because it has not established that there was a duty of disclosure, Neptune has not met its burden on appeal to establish that the trial court erred in finding against it on its fraudulent concealment theory. (See generally *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

4. *Second M2, PC Channel and CTX Contracts*

The trial court found that the Corporation was entitled to receive commissions in connection with the PC Channel, CTX and second M2 contracts. Neptune asserts that the

evidence permits only one conclusion, to wit, that Liuag procured the contracts while he was a Neptune employee, and that as a result it alone was entitled to receive the commissions on those contracts.

As to the PC Channel and CTX contracts, Neptune's argument is unavailing. The trial court found that Swoyer, rather than Liuag, was the primary source for procuring the PC Channel and CTX contracts and substantial evidence in the record supports this finding. The evidence showed that Liuag provided technical support and information to Swoyer while Swoyer was working with PC Channel and CTX, but that Swoyer was the sole contact with PC Channel and CTX prior to contracting. Further, the evidence showed that Swoyer prepared the order forms for the contracts, without any assistance from Liuag. This evidence supports the trial court's conclusion that SLM, through Swoyer, was the procuring agent for the PC Channel and CTX contracts and that, accordingly, the Corporation was entitled to receive commissions on the revenues generated pursuant to those contracts.

Neptune's argument is persuasive as to the second M2 contract, however. Although it is undisputed that Liuag was no longer employed by Neptune in June 1998, when M2 entered that contract, he also testified that, in accordance with MCI policies, SLM was entitled to be identified as the procuring agent on the new contract because it had procured the original M2 contract. In light of the trial court's finding that Neptune was the procuring agent of the first M2 contract (because Liuag was a Neptune employee at that time), which is not challenged on appeal, Liuag's uncontroverted testimony supports the conclusion that Neptune alone was entitled to the commissions on the second M2 contract. This conclusion is supported by the terms of the Agreement itself, which provided that SLM was not entitled

to commissions "for any revenue derived from any person or entity that was an MCI account . . . at the time of order solicitation[.]"

The Corporation argues that, even if it was not entitled to receive the commissions as a matter of contract, it is entitled to such commissions on an unjust enrichment theory. However, there is no basis for an unjust enrichment award in SLM's favor in light of (1) the finding that Liuag acted on Neptune's behalf initially, (2) the uncontroverted evidence that the initial procuring agent was entitled to credit for subsequent replacement contracts and (3) the contractual prohibition against SLM's recovery of commissions for revenues from an existing MCI customers. (See *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 [unjust enrichment arises only where one receives a benefit at another's expense]; *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419 [parties' express agreement as to compensation precludes recovery of compensation on an unjust enrichment theory].)

The Corporation also contends that Neptune waived the right to object to its entitlement to receive commissions because Neptune paid it commissions on the contracts until March or April of 1999. However, while Neptune may be estopped to contest SLM's entitlement to the commissions it already paid, the Corporation cites no persuasive authority to establish that, by virtue of such past payments, Neptune was obligated to continue paying it commissions on contracts for which it was not the procuring agent.

The evidence in the record amply supports the trial court's findings that the Corporation was entitled to recover additional commissions on the PC Channel and CTX contracts. It does not, however, support the trial court's award of commissions to the

Corporation on the second M2 contract and, accordingly, we modify the judgment to strike the \$14,990.07 in commissions attributable to that contract.

5. *The Southeast Wood Contract*

A. The Corporation's Entitlement to Commissions

Neptune argues that the Corporation cannot recover commissions generated pursuant to the Southeast Wood contract because the Corporation did not seek to recover under the contract in its complaint or identify the contract as one in dispute in its discovery responses. However, Neptune has not established that the trial court abused its discretion in allowing the Corporation to seek commissions under the Southeast Wood contract at trial. The Corporation's complaint sought to recover all commissions to which it was entitled under the terms of the Agreement and did not specifically identify any of the underlying customer contracts for which such commissions were sought. Further, although Neptune introduced evidence that the Corporation failed to identify the Southeast Wood contract in response to a single interrogatory and that the Corporation did not reference the Southeast Wood contract in a document production request, the record fails to establish that the Corporation did not identify the Southeast Wood contract in other depositions or discovery in the case. In any event, although Neptune argued on its nonsuit motion that the evidence was insufficient to establish the amount of commissions attributable to the Southeast Wood contract, it did not raise the current objection until its posttrial briefing regarding damages and its new trial motion and thus waived this issue for purposes of appeal. (E.g., *Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 291, and cases cited therein.)

## B. Calculation of Commissions

Neptune also challenges the amount the trial court awarded to the Corporation on the Southeast Wood contract. It contends that, because most of the contract related primarily to data services rather than voice services, the Corporation was only entitled to commissions calculated at 8 percent of the related revenues and thus the court erred in awarding commissions factored at a 10 percent rate. Neptune, however, does not provide any citation to the record to establish that the trial court failed to calculate the commissions based on the appropriate percentages. In fact, the trial court accepted Neptune's calculation of the total commissions owed to the Corporation through October 2000 (\$151,010.33), which calculation included 8 percent commissions on commissionable data service revenues attributable to the Southeast Wood contract for that period. Thus it appears that, at best, any miscalculation of Southeast Wood contract commissions relates to the period from November 2000 to January 2001. In determining the damage award, the trial court had before it evidence of the amounts of voice service revenues and data service revenues for that time period. It is Neptune's burden on appeal to establish that the court miscalculated the relevant commissions. It has not met this burden.

### 6. *Limitation on Damages: Expiration of the Agreement*

Finally, Neptune contends that the court erred in awarding the Corporation commissions accruing after October 2000 because the Agreement expired in accordance with its own terms. It relies on the first paragraph 11(a) of the Agreement, which provides "[t]he term of this Agreement shall begin as of the date of MCI's approval of [SLM as a sales agent]. The duration of [SLM]'s appointment is for a period of twenty four (24) months from

such date and will thereafter be automatically renewed for an additional term of twelve (12) months unless either party gives written notice of non-renewal to the other party a minimum of thirty (30) days prior to the renewal date." This contractual provision governs the duration of SLM's appointment to act as its agent in selling MCI services and products, but does not delineate SLM's entitlement to commissions on post-expiration revenues generated pursuant to contracts SLM procured as Neptune's agent.

Neptune nonetheless points to Paragraph 10 of the Agreement, which obligates it to pay SLM monthly commissions "*during the term of this Agreement.*" (Italics added.) Again, however, this provision does not specifically state that Neptune's obligation to pay commissions ceased upon the expiration of SLM's appointment to act as a Neptune sales agent.

A review of other provisions within the Agreement establishes that the parties intended for Neptune to have a continuing obligation to pay commissions beyond the expiration of SLM's appointment. For example, paragraph 14 provides in part:

"(b) *After normal expiration of the term, Sales Agent shall not promote or sell to current Neptune Accounts or provide leads of current Neptune Accounts for the services of any other person or entity that offers the MCI Services or services identical or similar to any one or more of the MCI Services for as long as Neptune is paying a commission under this Agreement but in no event fewer than six (6) months after termination of [this Agreement].*

"(c) *Upon termination [of the Agreement] with cause, . . . Sales Agent shall not promote or sell to Neptune Accounts the services of any other person or entity that offers service identical or similar to any one or more of the MCI Services for as long as Neptune is paying a commission under this Agreement but in no event fewer than twelve (12) months after termination of [this Agreement.]*" (Italics added.)



Such an intention is also apparent from the first paragraph 11(d), which specifically provides that, if Neptune terminates the Agreement for cause, its obligation to pay commissions "shall cease" and, if the cause is based on SLM's acts or omissions, SLM "shall be deemed to have waived all claims for any *expected future commissions or profits . . .*" (Italics added.) This provision would be surplusage if, as Neptune suggests, its obligation to pay commissions ended at the time the Agreement expired or was terminated.

These contractual provisions evidence the parties' intent that Neptune would continue to pay SLM commissions beyond the expiration of SLM's appointment. Accordingly, Neptune's argument that it was not required to pay SLM commissions on its sales agent accounts after October 2000 is unavailing.

#### DISPOSITION

The judgment is modified by striking the trial court's award of \$14,990.07 in commissions relating to the second M2 contract and the award of interest and, as so modified, is affirmed. The matter is remanded for further proceedings on the amount of interest to be awarded. Thereafter, the trial court shall enter an amended judgment consistent with this opinion. Each party is to bear its own costs on appeal.

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McINTYRE, J.

WE CONCUR:

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BENKE, Acting P. J.

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HALLER, J.